Supreme Court, U.S.
FILED

1287 (1) NO. 08-1344 APR 29 2009

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

CHUTEHALL CONSTRUCTION COMPANY, LTD.,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS AND MASSACHUSETTS WATER RESOURCES AUTHORITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MASSACHUSETTS APPEALS COURT

PETITION FOR WRIT OF CERTIORARI

ROBERT L. SHEKETOFF
Counsel of Record
One McKinley Square
Boston, Massachusetts 02109
(617) 367-3449

JOHN D. FITZPATRICK
PINGITORE & FITZPATRICK, LLC
47 Third Street, Suite 200
Cambridge, Massachusetts 02141
(617) 225-2400

Dated: April 29, 2009

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

I. Whether the Massachusetts Water Resources Authority (MWRA) followed federally mandated regulations in fining petitioner, where the MWRA issued its contested Penalty Assessment Notice ("PAN") against petitioner in disregard of the time limit for issuing a PAN and imposed the maximum sanction on petitioner contrary to the enforcement scheme.

II. Whether the MWRA's hearing process was constitutional under Ward v. Village of Monroeville, 409 U.S. 57 (1972) and Tumey v. Ohio, 273 U.S. 510 (1927) where the MWRA had a pecuniary self-interest in the outcome, MWRA's Executive director approved issuance of the PAN, appointed the MWRA's General Counsel (GC) to adjudicate the ensuing administrative hearing and approved his final decision, the GC was a member of the MWRA team responsible for reviewing and issuing the PAN, the Executive Director was the GC's supervisor, and the MWRA attorney prosecuting the MWRA case against petitioner was a member of the GC's staff.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Appeals Court of Massachusetts included the Commonwealth of Massachusetts, the MWRA, and the petitioner. There are no parties to the proceedings other than those named in the petition. Pursuant to Rule 29.6 the stock of petitioner is 100% owned by Chutehall Securities Limited, which is not a publicly held company.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Chutehall Construction Co., Ltd. (Chutehall or petitioner), respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the Appeals Court of Massachusetts, filed on November 14, 2008.

OPINIONS BELOW

The unpublished opinion of the Massachusetts Appeals Court, which is the subject of this petition, was filed on November 14, 2008, and is attached as Appendix (App.) App. 1a-6a. The Massachusetts Supreme Judicial Court's one-page order denying further appellate review was filed on January 29, 2009 and is attached as Appendix B. App. 7a-8a. The unpublished decision of the Massachusetts Superior Court which was appealed to the Appeals Court is attached as Appendix C. App. 9a-29a.

JURISDICTION

The decision of the Appeals Court of Massachusetts to be reviewed was filed on November 14, 2008. The Supreme Judicial Court of Massachusetts denied Further Appellate Review on January 29, 2009. This petition is filed within 90 days of that date. Rule 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Federal Constitutional Provisions

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be...deprived of life, liberty, or property, without due process of law [ ].

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law[ ].

B. Federal Regulatory Provisions

40 C.F.R. 403.3 (Definitions) reads in pertinent part:

> (q) The term *Publicly Owned Treatment Works* or *POTW* means a treatment works as defined by section 212 of the Act, which is owned by a State or municipality (as defined by section 502(4) of the Act). This definition includes any devices and systems used in the storage, treatment, recycling and reclamation of municipal sewage or industrial wastes of a liquid nature. It

also includes sewers, pipes and other conveyances only if they convey wastewater to a POTW Treatment Plant. The term also means the municipality as defined in section 502(4) of the Act, which has jurisdiction over the Indirect Discharges to and the discharges from such a treatment works.

40 C.F.R. 403.8(f)(5) reads as follows:

(5) The POTW shall develop and implement an enforcement response plan. This plan shall contain detailed procedures indicating how a POTW will investigate and respond to instances of industrial user noncompliance. The plan shall, at a minimum:

(i) Describe how the POTW will investigate instances of noncompliance;

(ii) Describe the types of escalating enforcement responses the POTW will take in response to all anticipated types of industrial user violations and the time periods within which responses will take place;

(iii) Identify (by title) the official(s) responsible for each type of response;

(iv) Adequately reflect the POTW's primary responsibility to enforce all applicable pretreatment requirements and standards, as detailed in 40 CFR 403.8 (f)(1) and (f)(2).

State Regulatory Provisions

The Massachusetts Water Resources Authority Enforcement (MWRA) Response Plan (ERP) reads in pertinent part:

MASSACHUSETTS WATER RESOURCES AUTHORITY ENFORCEMENT RESPONSE PLAN

Background

Pursuant to the July 24, 1990 revision to 40 CFR Part 403, the Massachusetts Water Resources Authority (MWRA) is required to develop and implement and enforcement response plan (40 CFR 403.8(f)(5)) as part of its Industrial Pretreatment Program. The MWRA developed such a plan in January 1990 consistent with the proposed amendments to 40 CFR Part 403 and draft guidance provided by the EPA. The MWRA and EPA agree that the plan should be revised to incorporate changes made in the final regulations and MWRA's pretreatment program implementation since the original plan was drafted. This agreement is set forth in a joint motion filed by EPA and the MWRA in the Boston Harbor litigation.

***

II. Enforcement Options

This section describes the types of escalating enforcement responses the MWRA will take in response to industrial user

violations and the time periods within which responses will take place. The options reflect the MWRA's authority to take enforcement action against users that have violated or threaten to violate the Sewer Use Rules and Regulations.

***

D. Penalty Assessment Notice.

MWRA Sewer Use Rules and Regulations (specifically, 360 C.M.R. 10.101 and 10.105) provide the legal authority to assess penalties for violations of the regulations or a permit in an amount up to $10,000 per violation per day. In the case of a continuing violation, each day's violation may be a separate violation. The Penalty Assessment Notice (PAN) will be issued consistent with 360 C.M.R. 2.00. A PAN will be issued within 60 days of the instance of noncompliance that requires a penalty. PANs will be issued for violations of NONs and Orders, and may be issued for other violations that the MWRA deems serious, including willful or intentional violations of the regulations of a permit.

***

STATEMENT OF THE CASE

Petitioner is entitled to reversal and remand due to an administrative enforcement proceeding which ignored the state agency's own guidelines adopted under a mandatory federal regulation and which violated due process.

Petitioner was fined for an unpermitted discharge of groundwater at a construction site in Boston. The issues raised by petitioner in its appeal of the fine included the MWRA's violation of its 60 day deadline for issuing fines under a Penalty Assessment Notice (PAN) adopted under the mandate of 40 C.F.R. 403.8 (f) (5). Petitioner argued it was unfair for the MWRA to ignore this deadline while at the same time using its delay in issuing the PAN against petitioner as a basis for fining petitioner. The MWRA argued that it was not bound by its 60 day deadline, although not offering any reason for ignoring the deadline other than staff's summer vacation schedules.

Petitioner also argued that the process the MWRA followed in hearing petitioner's appeal of the fine was constitutionally deficient under Ward v. Village of Monroeville, 409 U.S. 57 (1972) and Tumey v. Ohio, 273 U.S. 510 (1927. In this case the MWRA acted as both the arbiter of the fine's validity while at the same time standing to receive the proceeds from its levied fine. The MWRA had a pecuniary self-interest in the outcome of this case. This flaw was exacerbated by the way the MWRA handled petitioner's appeal. The MWRA's Executive Director approved the initial fine, appointed the MWRA's General Counsel (GC) to adjudicate the ensuing administrative hearing and reviewed and

approved the GC's final adjudicatory decision against petitioner. The GC was a member of the MWRA team responsible for reviewing and issuing the fine against petitioner in the first instance. The MWRA's Executive Director was the GC's supervisor. The MWRA attorney prosecuting the MWRA's case against petitioner was a member of the GC's staff. Petitioner maintains this extreme commingling of arbitral and enforcement roles was not consonant with this Court's definition of due process.

The Massachusetts Superior Court rejected petitioner's arguments and affirmed the MWRA's administrative decision against the petitioner on November 14, 2008. App. A. 1a-6a. Petitioner applied for further review in the Massachusetts Supreme Judicial Court, which rejected petitioner's application on January 29, 2009. App. B. 7a-8a.

REASONS FOR GRANTING THE WRIT

I. The Massachusetts Courts Were Wrong To Conclude a Massachusetts State Agency Could Disregard a Deadline Adopted Under Federal Mandate By Deeming the Deadline to be Advisory.

The MWRA was required to implement an Enforcement Response Plan (ERP) pursuant to federal regulations. 40 C.F.R. § 403.8 (f)(5). The federal regulation mandating the implementation of the MWRA's ERP provides that the ERP "shall contain detailed procedures" including "the time periods within which responses will take place." 40 C.F.R. § 403.8 (f)(5)(emphasis added). The regulation further states that the enforcement procedures adopted by the MWRA "shall at all times be fully and effectively exercised and implemented." Id. (emphasis added).

The ERP mandates that "[a] PAN [Penalty Assessment Notice] will be issued within 60 days of the instance of noncompliance that requires a penalty." However, it is undisputed the MWRA disregarded the sixty day time period and issued the PAN against Petitioner seventy-seven days after the alleged violation. In affirming the Superior Court Decision, the Appeals Court stated the ERP was "merely advisory" and held that although the PAN was issued well after sixty days, the MWRA did not fail to follow its own regulations in issuing the PAN.

This holding is incorrect as a matter of federal law. Because federal law mandates that the MWRA must follow the procedures it has adopted in the ERP "at all times," 40 C.F.R. § 403.8 (f), the ERP

cannot be "merely advisory," as the Appeals Court found.

The Appeals Court also erroneously held that a two year limitations period applies for issuing a PAN under state law. However, inclusion of a federally mandated sixty day limitations period in the ERP would be pointless if a two year limitations period applied instead under state law. State law cannot trump federal law in this way.

As a result of MWRA's failure to abide by the ERP petitioner suffered unfair prejudice. While unaware of the MWRA's intention to fine petitioner, petitioner settled its dispute of a fine separately imposed by the City of Boston for the same alleged unpermitted discharge and considered the matter closed. The MWRA then imposed its untimely fine against petitioner. Adding proverbial insult to injury the MWRA later supported the validity of its fine by citing both petitioner's alleged failure to preserve exculpatory evidence (which petitioner had no reason to do, thinking that this matter had been resolve by its settlement with the City) and the petitioner's compromise with the City of Boston.

Because the MWRA acted unlawfully in fining petitioner contrary to federal law, the Appeals Court should have vacated the Superior Court decision and fine imposed in this case.

II. The Hearing Process Used By The MWRA To Adjudicate The Fine in Question Violated Due Process.

The MWRA's hearing process followed in this case was constitutionally defective because it was unfairly biased. Adjudicatory proceedings where the arbiter has a pecuniary self-interest in the outcome are unconstitutional. Ward v. Village of Monroeville, 409 U.S. 57, 61 (1972); Tumey v. Ohio, 273 U.S. 510, 523 (1927). Subsequent judicial review (*de novo* or not) does not save such constitutional deficiencies. Ward, 409 U.S. at 61.

Here the MWRA had a direct financial stake in denying the petitioner's appeal. Similarly, the bias of the Presiding Officer (the MWRA's General Counsel, or GC) who conducted the administrative hearing was substantial.

The Appeals Court erroneously held that the GC's pecuniary interest should not disqualify him because his salary as an employee was not based on the outcome of the administrative hearing he conducted. Although the GC would not directly collect the $10,000 assessed against petitioner, a financial stake in the proceeding need not be direct, positive or personal to disqualify the adjudicator for bias. Esso Standard Oil Co. v. Cotto, 389 F.3d 212, 219 (1st Cir. 2004); United Church of The Medical Center v. Medical Center Commission, 689 F.2d 693, 700 (7th Cir. 1982); see also Ward, 409 U.S. 57. Thus, disqualification is necessary even where the pecuniary interest "'is only an indirect outgrowth of a public official's desire to protect official funds.'" United Church of The Medical Center, 689 F.2d at 700 (internal quotations omitted). The Appeals

Court erred in holding that the MWRA and its GC lacked a pecuniary interest in this proceeding against petitioner based on the asserted absence of direct or personal interest.

Exacerbating MWRA's bias is the degree to which the GC essentially acted as a prosecutor as part of the enforcement process itself. The GC was the Presiding Officer responsible for initially vetting and approving the fine issued against petitioner. The MWRA attorney prosecuting the case against petitioner heard by the GC as fact-finder was one of the GC's staff members. Furthermore, the GC's supervisor (acting on the recommendation of the GC's staff) personally reviewed and approved the subject fine before the later administrative hearing on the merits of the fine.

While there is a general presumption that State officials perform their duties fairly, Withrow v. Larkin, 421 U.S. 35, 55 (1975), the Appeals Court improperly relied on that presumption without considering the overwhelming bias evident here. "Every procedure which would offer a possible temptation to the average man as a judge. . . not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." Tumey, 273 U.S. at 532. When there is such a probability of bias the adjudicator should be disqualified. In re Murchison, 349 U.S. 133, 136 (1955).

The extreme overlap here between investigatory and adjudicative functions and the close relationship between the involved officials, combined with the pecuniary interest in collecting the fine, denied petitioner a fair hearing as required

by the Fifth and Fourteenth Amendments to the Constitution.

Respectfully submitted,
CHUTEHALL CONSTRUCTION CO., LTD.
By its attorney,

ROBERT L. SHEKETOFF
Counsel of Record
One McKinley Square
Boston, Massachusetts 02109
(617) 367-3449

JOHN D. FITZPATRICK
PINGITORE & FITZPATRICK, LLC
47 Third Street, Suite 200
Cambridge, Massachusetts 02141
(617) 225-2400

Dated: April 29, 2009

APPENDIX A

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT
07-P-1415
CHUTEHALL CONSTRUCTION COMPANY, LTD.
vs.
COMMONWEALTH OF MASSACHUSETTS & another.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

In this appeal, Chutehall Construction Company, Ltd. (Chutehall) contests the legality of a penalty assessment notice (PAN) issued by the Massachusetts Water Resources Authority (MWRA). Chutehall appeals the decision of the Superior Court under G. L. c. 30A, § 14, upholding the decision of the MWRA's presiding officer to issue the PAN. In doing so, it largely reiterates the arguments it made before both the presiding officer and the Superior Court judge. We affirm for substantially the reasons stated by the Superior Court judge in his detailed decision and expound only on those claims that warrant further discussion.

Background. In the summer of 2004, Chutehall was renovating a home on Brimmer Street in the Beacon Hill section of Boston that required it to control the flow of groundwater at the construction site. Chutehall did not obtain dewatering permits from the MWRA and the Boston water and sewer commission (BWSC) before

[1] Massachusetts Water Resources Authority (MWRA). The Commonwealth was represented on appeal by counsel for the MWRA, but did not actively participate.

beginning work on the project. A BWSC inspector discovered that Chutehall was impermissibly discharging water into the sewer system after conducting a test in which he placed green dye in a pipe at the project site and observed the dyed water flowing below him when he opened a nearby sewer manhole.

The day after the test, the BWSC issued a cease and desist order that required Chutehall to obtain a dewatering permit in order to discharge groundwater into the sewer system. The BWSC also fined Chutehall $2,000, although it later agreed to reduce the fine to $1,000. Chutehall paid the fine, but expressly stated that it was not acknowledging that it had violated any regulation by doing so. On September 17, 2004, seventy-seven days after the MWRA first became aware of Chutehall's violation, the MWRA served Chutehall with a PAN in the amount of $10,000.

Discussion. 1. Failure to follow regulations. Chutehall argues, inter alia, that the MWRA failed to follow its own regulations in assessing the PAN. The MWRA is required by Federal law to develop and implement an enforcement plan. 40 C.F.R. § 403.8(f) (5) (2008). Chutehall points to the MWRA's enforcement response plan (ERP), which sets forth guidelines for the MWRA's enforcement actions for violations of relevant State regulations, and which states that the issuance of a PAN will occur within sixty days of the violation. Here, the MWRA did not take action against Chutehall until seventy-seven days had passed. As a result, Chutehall argues that the MWRA failed to follow both its own procedures and Federal law when it issued the PAN.

Both the presiding officer and the Superior Court judge concluded that the ERP was merely

advisory and that the MWRA was permitted to issue the PAN beyond the sixty-day guideline. There was no error in this determination. Indeed, the preamble of the ERP states that it "is intended as guidance solely for the use of MWRA personnel. Nothing herein is intended to create legal rights or obligations or to limit the enforcement discretion of the [MWRA]." The ERP preamble also states that "the ERP is based upon MWRA's regulations (360 C.M.R. Sections 1.00, 2.00 and 10.00)." In this regard, § II(D) of the ERP, which addresses enforcement options and PANs in particular, states that PANs "will be issued consistent with 360 C.M.R. 2.00," which establishes a two-year limitations period. 360 Code Mass. Regs. § 2.32(2) (2003).

Here, the PAN was issued seventy-seven days after the violation, clearly within the two-year limitations period. As Chutehall cannot assert a defense under the ERP and has not alleged that the MWRA failed to comply with the limitations period set forth in the relevant regulation, the trial judge committed no error in affirming the MWRA's issuance of the PAN more than sixty days after the violation.

2. Claims of bias. Chutehall also argues that it was deprived of its constitutional right to due process, claiming that the hearing process used by the MWRA is inherently biased in two respects: first, the MWRA performs both investigative and adjudicative functions, and second, the MWRA directly collects revenue from the PANs it issues. We disagree on both counts.

An agency's combination of investigative and adjudicative functions alone does not deprive the subject of the investigation and hearing of his constitutional rights. See Raymond v. Board of Registration in Med., 387 Mass. 708, 716-717 (1982);

Craven v. State Ethics Commn., 390 Mass. 191, 198-199 (1983). The United States Supreme Court has stated that allegations of unconstitutional risk of bias in this context "must overcome a presumption of honesty and integrity in those serving as adjudicators" and "must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." Withrow v. Larkin, 421 U.S. 35, 47 (1975). Accord Raymond, supra at 716.

Chutehall points to no facts that support a showing of actual bias. Instead, Chutehall merely states that the structure and operation of the MWRA (which permitted certain employees to participate in both the investigation and the adjudicatory hearing of Chutehall) made it impossible for Chutehall to have a fair hearing. Such broad allegations, without more, are insufficient to overcome the presumption that State officials perform their duties fairly. See Withrow, supra at 55 ("[S]tate administrators 'are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances,'" quoting from United States v. Morgan, 313 U.S. 409, 421[1941]).

Chutehall further argues that the MWRA has a pecuniary self-interest in issuing PANs because the money obtained thereby is retained by the MWRA. Again, Chutehall fails to overcome the presumption of impartiality and fairness. See Craven, supra at 199 ("[W]ithout a showing to the contrary, we assume that State administrators are impartial and fair in performing their duties").

Chutehall concedes that the presiding officer does not directly receive any part of the fine that is assessed, although the money collected is applied to the MWRA's operating expenses, including the salary of the presiding officer. The United States Supreme Court, however, has held that contributions to a fund out of which the salary of the adjudicator is paid does not alone render the hearing process unconstitutional. See Dugan v. Ohio, 277 U.S. 61, 62-63 (1928) (no due process violation where defendant was convicted by mayor and required to pay a fine into a general fund that also paid the mayor's salary because the mayor's salary was fixed and he received no fees for each conviction). See also Allen v. Cuomo, 100 F.3d 253 (2d Cir. 1996); Van Harken v. Chicago, 103 F.3d 136, 1353 (7th Cir. 1997).

The imposition of fees deposited into such a fund has been distinguished from instances in which the hearing officer personally receives fines paid by convicted defendants, Tumey v. Ohio, 273 U.S. 510 (1927), accord Commonwealth v. Ellis, 429 Mass. 362, 368 n.7 (1999); or conducts hearings against his professional competitors, Gibson v. Berryhill, 411 U.S. 564, 578-579 (1973) (Alabama board of optometry members had personal interest in hearings on fellow optometrists), accord Varga v. Board of Registration of Chiropractors, 411 Mass. 302, 307 (1991); or is also primarily responsible for securing finances that are obtained in substantial part by the fines imposed by the hearing officer, Ward v. Monroeville, 409 U.S. 57, 60 (1972) (mayor's "executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court"), accord Varga, supra. None of these instances is present here and

the hearing process used by the MWRA passes constitutional muster.

Judgment affirmed.

By the Court (Rapoza, C.J., Smith & Sikora, JJ.),

Clerk

Entered: November 14, 2008.

APPENDIX B

Supreme Judicial Court
for the Commonwealth of Massachusetts
John Adams Courthouse
One Pemberton Square, Suite 1400, Boston,
Massachusetts 02108-1724
Telephone 617-557-1020, Fax 617-557-1145

John D. Fitzpatrick, Esq.
Fitzpatrick & Warrenbrand, LLP
47 Third Street, Suite 201
East Cambridge, MA 02141

Re: DOCKET No. FAR-17406

CHUTEHALL CONSTRUCTION COMPANY, LTD.

vs.

COMMONWEALTH OF MASSACHUSETTS & another

Suffolk Superior Court No. SUCV2006-01556
A.C. No. 2007-P-1415

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on 01/29/09, the above-captioned Application for Further Appellate Review was denied.

/s/ Susan Mellen
Susan Mellen, Clerk

Dated: January 29, 2009

To: John D. Fitzpatrick, Esquire
Charles C. Bering, Esquire

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK,ss **SUPERIOR COURT**
CIVIL ACTION NO. 06-15568

CHUTEHALL CONSTRUCTION CO., LTD.

VS.

COMMONWEALTH OF MASSACHUSETTS, MASSACHUSETTS WATER RESOURCES AUTHORITY

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

This action arises from defendant Massachusetts Water Resources Authority's ("MWRA") issuance of a Penalty Assessment Notice ("PAN") against plaintiff Chutehall Construction Co., Ltd. ("Chutehall"). The PAN was affirmed by the MWRA on March 14, 2006. Plaintiff Chutehall filed suit in this court, under the authority of G. L. c. 30A, appealing the March 14, 2006, final decision rendered by the MWRA's Executive Director.

At bar is Chutehall's Motion for Judgment on the Pleadings, pursuant to Mass. R. Civ. P 12(c). The MWRA has filed an opposition to Chutehall's motion, and is joined, nominally, by the Commonwealth of

Massachusetts[1] ("the Commonwealth"). On March 7, 2007, the court heard arguments by counsel for Chutehall and the MWRA in support of their respective motions. Chutehall moves the court to set aside the PAN and the Executive Director's final decision, and to grant any other relief as may be appropriate. In opposition to Chutehall's motion, the MWRA contends that the Executive Director's final decision is supported by the evidence, and is legally and procedurally sound. For the following reasons the court AFFIRMS the MWRA Executive Director's final decision upholding the PAN issuance, and DENIES Chutehall's Motion for Judgment on the Pleadings.

PROCEDURAL BACKGROUND AND THE MWRA'S FINDINGS[2]

On September 17, 2004, the MWRA issued a PAN, pursuant to 360 C.M.R. § 2.11 and § 2.14, assessing a $10,000 penalty against Chutehall for

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[1] The Commonwealth of Massachusetts declined to appear at the motion hearing or to otherwise participate in this action. Standing Order 1-96 ¶¶ 4-5.

[2] The administrative record consists of all documents, records, correspondences, notices, and decisions rendered by agencies. Citations to the administrative record will be noted with "AR" with page number. Also reviewed as part of the administrative record were three transcripts relating to testimony obtained at hearings conducted on June 7, 2005, June 9, 2005, and September 8, 2005, before the Presiding Officer. Any citation to hearing testimony will be noted with "TR I, TR II," etc., with the reference to the original transcript page number rather than to the administrative record page number because each AR page contains four pages of transcribed testimony. "TR I" shall refer to the June 7, 2005 hearing, "TR II" to the June 9, 2005 hearing; and "TR III" to the September 8, 2005 hearing.

violating its regulations by intentionally discharging groundwater from a construction dewatering site into a combined sewer system, without obtaining the necessary construction dewatering permit required by 360 C.M.R. § 10.000. (AR: 1). Chutehall sought an adjudicatory hearing from the MWRA, pursuant to 360 C.M.R § 1.00 and § 2.22, to vacate the PAN and the attendant fine. (AR: 10).

1. The MWRA Evidentiary Hearing

As part of the adjudicatory hearing, an evidentiary hearing was conducted over the course of three days (June 7, June 9, and September 8, 2005). (AR: 603). At the hearing, Presiding Officer Steven Remsberg was presented with the parties' briefs, the submitted documents in evidence, and the testimony of five witnesses. Id. A synopsis of the facts in evidence follows.

In, or around, June or July 2004, Chutehall was engaged in a construction project ("Project") at 44 Brimmer Street in Boston. (TR II: 193). Brimmer Street is in a section of Boston which hosts a combined sewer system[3] (TR I: 30). The Boston Water Sewer Commission's ("BWSC") sewer line runs from the Mount Vernon Street - 44 Brimmer Street intersection directly into the MWRA sewer line that extends beneath Storrow Drive. (AR: 274-278). The BWSC oversees the sanitary sewers and sewer lines within the City of Boston and its neighborhoods while the MWRA operates the water treatment facility that ultimately discharges

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[3] A combined sewage system is one in which sanitary waste from homes and street storm drains are connected to the same pipe. (TR I: 29-30).

Boston's wastewater into the Atlantic Ocean.[4] Both the MWRA and the BWSC prohibit the discharge of either stormwater or groundwater into their combined sewer systems, except as authorized by a construction dewatering permit. 360 C.M.R. § 1.00; 360 C.M.R. § 10.021-10.023; Art. V, Part B, § 4 of BWSC Sewer Use Regulations at AR: 1013. Chutehall never applied for, or obtained, a permit from either agency. (AR: 0605).

The Project involved "underpinning," a process by which rotting wooden piles that support older Beacon Hill buildings are cut out and replaced by temporary supports while a concrete foundation is put into place. (TR II: 194). During the underpinning process, Chutehall was not surprised to encounter groundwater, given that the excavation required to perform the underpinning extended several feet

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[4] The MWRA may be considered the wholesale provider of sewage and water services to the City of Boston, for the MWRA's main sewage trunk lines and waste treatment facility connectors bring Boston wastewater into the wastewater treatment plant for treatment and eventual discharge into the ocean. (TR I: 36-38). MWRA and BWSC's rules are in general accord, and BWSC has regulations that prohibit knowing placement of rocks, grit, and dirt, and restaurant grease into the wastewater system. (TR I:39). Regarding construction site dewatering, BWSC's regulation require "sedimentation tanks" to prevent introduction of rocks, grit, and dirt into the water systems. In accordance with the terms within issued dewatering permits, monthly wastewater analysis is conducted to monitor groundwater quality. The analysis is intended to detect pollutants in the groundwater, that is to say, fats, oils, grease, volatile organic compounds, lead, mercury, and suspended solids. (TR I: 40-41). According to EPA guidelines, the presence of certain materials in wastewater (such as mercury) may require that the wastewater sludge be converted into landfill rather than discharged into the Atlantic or other body of water. (TR I: 41).

below the groundwater level. Id. Knowing that the excavation area had to be kept dry, Chutehall's method of coping with the encountered groundwater was to pump it into a "recharge pit." (TR II: 195). According to James Chute, a civil engineer and president of Chutehall, a "recharge pit" is simply a hole, dug into the ground, where excavation water is pumped and returned to the ground. (TR II 191-192; 195). Chutehall claimed that it used a combination of three groundwater recharge pits, which were site-contained, in order to cope with the need for continuous dewatering on the Project. (TR II: 195-196).

On July 1, 2004, Paul Barden ("Barden"), a BWSC inspector, visited the Project. (TR II:131). Barden asked one of the Chutehall workers whether the Project involved any dewatering into the BWSC sewers. (TR II: 133). Barden was shown a hose that was actively discharging its contents into a pipe, and was told that the hose ran from a dewatering pump and that the pipe, which at one time used to be connected to the sewer lines, was currently cut off and instead transported the excess groundwater to one of the recharge pits. (TR II: 133). Barden decided to test the assertion and poured several ounces of green dye into the pipe along with the standing site groundwater discharged from the hose. (TR III: 17). He then went to the intersection of Mt. Vernon and Brimmer Streets, uncovered a sewer manhole, and there observed the green dye flowing in the water directly below. (TR II: 137-143). Given the concentration of the dye and the short amount of time that it took him to reach the manhole location, Barden concluded that he was "100%" certain that the dye had flowed through the pipe, proving that

the pipe was in fact connected to the sewer. Id.; (TR II: 17- 21, 82).

As a result of the positive dye test, the BWSC issued a Cease and Desist Order to Chutehall the next day and imposed a $2,000 fine. (AR: 985). Although the July 2, 2004 Order obligated Chutehall to stop all discharges in to the sewer and to obtain a construction dewatering permit, the record shows no evidence that Chutehall ever applied for such a permit.

On July 16, 2004, Chutehall requested that the BWSC reconsider the imposition of the penalty. (AR: 1049). A little more than a week later, on July 29, 2004, the BWSC reduced the penalty to $1,000 without explanation. (AR: 1123). Chutehall paid the fine but continued to protest that it had not discharged groundwater in violation of BWSC's regulations. (AR: 1124). The Presiding Officer specifically noted that he did not consider the communications between BWSC and Chutehall as either settlement negotiations or as an admission of wrongdoing by Chutehall. (AR: 611).

At the three-day evidentiary hearing, Chutehall challenged the validity of the dye testing method. Chute testified that in his opinion dye tests were highly unreliable, and that Barden's dye test was even more suspect because it was not repeated. Chutehall additionally pointed out that the dye-test was not witnessed by Chutehall, or confirmed by alternate tests, and that it was not conducted with appropriate safeguards and procedures to ensure the accuracy of the results. (TR II: 201-202). Chute further testified that the green dye could have found its way to the manhole through an indirect and

circuitous route, noting that a month after the green dye test was performed, Chutehall workers observed a green coloration in the soil of one of its recharge pits in August 2004: (TR II: 223).

2. The Presiding Officer's Revised Tentative Decision

After three days of testimony, the MWRA Presiding Officer set forth his findings and rulings in a Tentative Decision issued preliminarily on January 25, 2006. (AR: 533). After receiving comments from Chutehall, the Presiding Officer revised his Tentative Decision and released it on March 1, 2006. (AR: 571).

He found by a preponderance of the credible evidence that Barden's dye test accurately showed that Chutehall's hose-and-pipe arrangement "caused either a direct or indirect discharge to both the BWSC and, necessarily to the MWRA sewer lines, that such a discharge required a permit, and that Chutehall failed to obtain such a permit." (AR: 620). The Presiding Officer based his decision on the strength of "(i) the certainty of Mr. Barden's testimony concerning his observations regarding the dye test, and (ii) the lack of any serious objection by Chutehall both during the test and immediately after the results BWSC's dye test were revealed to it." (AR:612). Additionally, he found that the MWRA had met its burden of proof on the issue of discharge, but that Chutehall failed to muster sufficient credible evidence to rebut the MWRA's *prima facie* case, and underscored Chutehall's failure to offer any specific evidence, other than Chute's own opinions, to undercut the reliability of BWSC's dye test. Id.

The Presiding Officer next found that Chutehall's discharge of groundwater into the sewer lines was "intentional," thus violating 360 C.M.R. § 2.33. (AR: 621). Under the regulation, the term "intentionally" is defined as "knowingly intending to do the act that constitutes the violation, not that the Person knowingly intended to violate the requirement." 360 C.M.R. § 2.33(2). The Presiding Officer reasoned that because the definition eliminates the need to prove an individual's state of mind, the focus is on the act itself. Id. Consequently, Chutehall's act of inserting the hose into the pipe was, itself, intentional, as opposed to accidental. (AR: 622-623).

The Presiding Officer also found that the procedure employed by the MWRA in issuing the PAN was in accordance with MWRA regulations. (AR: 626-627). Specifically, the Presiding Officer found that the MWRA's Enforcement Response Plan ("ERP") provided guidelines to help determine the initial, successive, and escalating levels of enforcement actions that the MWRA may take for violations of 360 C.M.R. § 10.000. (AR: 623). Because the Presiding Officer found the ERP to be an "internal guide" for MWRA staff, he concluded that the ERP was merely advisory and did not carry the force of law. (AR: 625). Thus, he ruled that Chutehall could not use the ERP to "attack the choice of the enforcement action chosen or the fact that the enforcement action included the imposition of the maximum penalty allowed." (AR:626).

Finally, the Presiding Officer found that the $10,000 penalty recited in the PAN to be fully consistent with the regulatory framework binding the MWRA. The Presiding Officer noted that the size

of the penalty imposed on Chutehall was in accordance with the requirements of MWRA regulation 360 C.M.R. § 2.00 as well as the ERP, noting that the ERP provides that a PAN issuance needs be "consistent with 360 C.M.R. § 2.00." (AR: 625). The Presiding Officer was satisfied that the size of penalty was justified both as an intentional violation under § 2.33(2), or as a non intentional violation under § 2.33(5). (AR: 627). Specifically, the Presiding Officer pointed to the language in § 2.33(2) which sets a flat $10,000 fine for an intentional violation, and then stated that there were at least three provisions under 360 C.M.R. § 2.33(5)(g-i) that supported the maximum penalty imposed on Chutehall. (AR: 627). He explained that under factor (g), Chutehall obviously derived an economic benefit from its failure to comply with the regulation's permit requirement; under factor (h) the MWRA had the authority to impose a penalty in an amount "sufficient to deter future noncompliance by the violator and/or by other persons;" and, under factor (i) the MWRA was to consider the public interest in setting the amount of the penalty. (AR: 628). The Presiding Officer concluded that all three provisions, whether considered individually or collectively, "easily justified" the size of the PAN fine, and highlighted factor (i) by observing that "the interests of the public favor imposition of the maximum penalty in order that [Chutehall] and others realize that their acts can have adverse consequences for the costs of wastewater treatment and for MWRA's overall compliance with state and federal laws governing water pollution control." (AR: 627, 629).

3. Post-Tentative Decision

On March 14, 2006, the MWRA's Executive Officer issued a Final Decision which incorporated the Presiding Officer's Revised Tentative Decision and upheld the PAN in its entirety. (AR: 600). Less than a month later, on April 11, 2006, Chutehall appealed the Final Decision to this court, pursuant to G. L. c. 30A.

STANDARD OF REVIEW

A reviewing court may set aside an administrative decision if it finds that the substantial rights of a party may have been prejudiced because the decision is defective under G. L. c. 30, § 14(7). The party appealing an administrative decision bears the burden of demonstrating the decision's invalidity. Merisme v. Board of Appeals on Motor Vehicle Liab. Policies & Bds., 27 Mass. App. Ct. 470, 474 (1989).

A court's review of an agency decision is confined to the administrative record. G.L.c. 30A, § 14(5). The reviewing court is required to give due weight to the agency's experience, technical competence, specialized knowledge, and the discretionary authority conferred upon it by statute. Town of Hingham v. Department of Telecomm.and Energy, 433 Mass. 198, 201 (2001); Evans v. Contributory Retirement Appeal Bd., 46 Mass. App. Ct. 229, 233 (1999); Hotchkiss v. State Racing Comm'n, 45 Mass. App. Ct. 684, 695-696 (1998); Flint v.Commissioner of Pub.Welfare, 412 Mass. 416, 420 (1992); Seagram Distillers Co. v. Alcoholic Beverages Control Comm'n, 401 Mass. 713, 721 (1988). The reviewing court may not substitute its

judgment for that of the agency. Flemings v. Contributory Retirement Appeal Bd., 431 Mass. 374, 375 (2000); Southern Worcester County Regional Vocational Sch. Dist. v. Labor Relations Comm'n, 386 Mass. 414, 420-21 (1982), citing Olde Towne Liquor Store, Inc. v. Alcoholic Beverages Control Comm'n, 372 Mass. 152, 154 (1977). Unless the administrative decision is unsupported by substantial evidence, it will be allowed to stand. Dohoney v. Director of Div. of Employment Security, 377 Mass. 333 (1979). The findings and decision of the agency are to be sustained wherever possible and are not to be reversed unless they are wholly lacking in evidentiary support or are tainted by errors of law. Woolfall's Case, 13 Mass. App. Ct. 1070 (1982). A court may not dispute an administrative agency's choice between two conflicting views, even though the court would justifiably have made a different choice had the matter come before it de novo. Seagram Distillers Co. v. Alcoholic Beverages Control Comm'n, 401 Mass. at 721; Zoning Bd. of Appeals of Wellesley v. Housing Appeals Comm'n, 385 Mass. 651, 657 (1982).

DISCUSSION

Chutehall moves this court, pursuant to Mass. R. Civ. P: 12 (c), to vacate the MWRA Executive Director's Final Decision, and to dismiss the PAN issued by the MWRA. Chutehall advances a multitude of arguments in support of its motion that the Final Decision upholding the assessment was: (1) in excess of statutory authority, and in violation of constitutional provisions; (2) based upon errors of law; (3) made upon an unlawful procedure; (4) unsupported by substantial evidence and unwarranted on the facts; and, (5) arbitrary and

capricious, an abuse of discretion, or otherwise not in accordance with the law. The court addresses each argument in turn.

1. Statutory Authority and Constitutionality of the MWRA's Adjudicatory Proceeding

Chutehall alleges that bias inhered in the MWRA adjudicatory proceeding, violating Chutehall's rights under the Fifth and Fourteenth Amendments to the United States Constitution and Articles 12 and 29 of the Massachusetts Declaration of Rights. At the heart of Chutehall's allegation of bias is a challenge to the MWRA's ability to perform both investigative and adjudicative functions.

The General Court charged the MWRA with providing "sewer main services" to the City of Boston and other member communities, and with regulating discharges to its sewers. St. 1984, c. 372[6] §§ 6 (e) and 8(m). In accordance with the statutory mandate, the MWRA enforces its regulations and permits by means of administrative orders and Penalty Assessment Notices, pursuant to 360 C.M.R. § 2.11-1.14 and § 2.33; and provides for adjudicatory hearings on appeals of PANs pursuant to 360 C.M.R. § 100 and § 2.22. "[T]he combination of investigative and adjudicative functions in the board [do] not, without more, deny...constitutional or statutory rights." Raymond v. Board of Registration in Medicine, 387 Mass. 708, 717 (1982). There is no evidence in the administrative record to support the contention that the MWRA has exceeded its

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[6] Previously codified as General Law c. 92; currently codified as Spec. L. c. S67, § 1 et seq.

statutory authority in performing both duties in this matter.

Chutehall maintains that the hearing process used by the MWRA to adjudicate the PAN is constitutionally defective due to the "inherent bias permeating the MWRA's present appellate process." (Mot. for J. on the Pleadings, Docket #5 at 6). Chutehall supports its allegation of bias by: detailing promotions from the investigatory wing of the MWRA to the adjudicatory wing of the MWRA; pointing to the MWRA's alleged pecuniary self-interest in its adjudicatory proceedings; and citing its failed attempts to subpoena the MWRA Executive Director as a witness in the evidentiary hearing.

There exists a presumption of neutrality on the part of administrative adjudicators. Raymond, 387 Mass. at 716; see also Craven v. State Ethics Comm'n, 390 Mass. 191, 198 (1983) ("[W]ithout a showing to the contrary, we assume that State administrators are impartial and fair in performing their duties."). Because an agency may properly be charged with two differing functions, Chutehall cannot, without more, simply point to employee promotions from one department of the MWRA to another as being indicative of bias.

Chutehall's next allegation is that the MWRA has a constitutionally impermissible pecuniary self-interest in upholding a PAN. This assertion is similarly unpersuasive. Evidence of a direct pecuniary interest, or other interest sufficient to rebut the presumption of neutrality, is required to show a violation of due process. See Dugan v. Ohio, 277. U.S. 61, 64-65 (1928) (holding that due process is not violated in cases decided by a mayor on a fixed

salary, and who has no direct responsibility for the municipal budget); compare Tumey v. Ohio, 273 U.S. 510, 513 (1927) (finding bias where mayor-judge personally receives costs from fines paid by convicted defendants, but not from those who were acquitted); Ward v. Village of Monroeville, 409 U.S. 57, 61 (1972) (holding that due process is violated where a mayor serves in an adjudicatory role when he is also responsible for a municipal budget to which fines and penalties contribute a substantial portion); Gibson v. Berryhill, 411 U.S. 564, 579 (1973) (ruling that bias exists where members of the Alabama Board of Optometry were conducting license revocation proceedings against their competitors). In the instant case, the MWRA's Presiding Officers are salaried employees, who have no direct responsibility for the MWRA's budget. Chutehall has offered no evidence to rebut the presumption of neutrality, and fails to show either actual, personal bias or institutional bias in the MWRA's adjudicatory process.

Likewise, Chutehall cannot prevail on its final assertion of bias because it was denied the opportunity to subpoena and call the Executive Director as a witness. As best can be understood from Chutehall's motion and the hearing transcript pages that Chutehall references, it appears that in an effort to show pecuniary self-interest or bias in the PAN hearing procedure, Chutehall wished to examine the Executive Director in order to gather information regarding PAN fines' percentage contribution to the MWRA' s total revenue.[6]

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[6] On June 9, 2005, hearing witness Carolyn Fiore ("Fiore") testified that the MWRA assesses charges to municipalities and to permit holders for a variety of charges, that those charges

However, Chutehall again fails to set forth any facts that establish relevance of this information to the primary issue before the Presiding Officer, that is to say, whether or not Chutehall violated discharge regulations. Moreover, bearing testimony established that permitting and PAN revenues help to fund MWRA operations. It is not manifest that the Executive Director could offer any additional relevant information on this purported bias issue. For the same reasons as delineated in the prior paragraph, i.e., failure to show actual, personal bias or institutional bias, Chutehall was not prejudiced by the denial of its subpoena to call the Executive Director.

2. The Final Decision Is Not Based Upon Errors of Law

a. Allocation The Burden Of Proof

Chutehall argues, without legal support, that the Presiding Officer impermissibly allocated the burden of proof when he declared that once he found Barden's testimony regarding the positive dye test to be credible, the burden shifted to Chutehall to disprove the accuracy of the test. (AR: 619). Under 360 C.M.R. § 1.24(5)(d)(3), the MWRA bears the burden of "going forward with and of proving the occurrence of any contested alleged violations" for each of the elements of the violation cited in the PAN. "Following presentation of the [MWRA's] evidence," § 1.24(5) (d)(3) further states that "the

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fund MWRA operations; and that funds obtained from successful enforcement of PANs are placed into a general MWRA fund that contributes to funding MWRA operations.

Person appealing the action shall have the burden of presenting and of going forward with any defense to the [MWRA's] allegations." This is precisely what occurred here: the Presiding Officer wrote that the MWRA met its burden of proof regarding the accuracy of the dye-test, shifting the burden to Chutehall to present a defense to the allegations. There is no error of law when the Presiding Officer proceeds in accordance with the applicable MWRA regulation.

b. Chutehall's Payment of a Reduced BWSC Fine

The main thrust of Chutehall's assertion is that the Presiding Officer improperly noticed and considered Chutehall's communications with the BWSC over its Cease and Desist Order and the accompanying fine. Under 360 C.M.R. § 1.24(6)(e), a Presiding Officer "may take notice of any fact which may be judicially noticed by Massachusetts courts."

The court finds no error in the administrative notice of these facts in the present case. The Presiding Officer explained his action by observing that Chutehall's arguments concerning "constitutional" issues foreshadowed an eventual appeal of his final decision to the Superior Court. (AR: 322). Accordingly, the Presiding Officer intended to provide "a full and complete record'" of all the issues raised before him. Id. Chutehall maintains that by taking administrative notice, the Presiding Officer infers that Chutehall admitted to its improper discharge. However, the Presiding Office states clearly that he did "not consider the exchange of letters between BWSC and Chutehall's counsel to constitute settlement negotiations," nor

did he "regard the payment of $1000 by Chutehall to BWSC as an admission by Chutehall of a violation of BWSC's or MWRA's regulations." (AR: 581). Moreover, the Presiding Officer took administrative notice of Chutehall's continuing objection to the Cease and Desist Order, despite Chutehall's payment of the fine. Furthermore, because MWRA adjudicatory proceedings are not bound by Massachusetts evidentiary rules, offers of compromise may be admissible as evidence of liability. 360 C.M.R. § 1.24(6)(b).[7] Thus, there is no error of law in the Presiding Officer's act of taking administrative notice of Chutehall's payment of the BWSC reduced penalty fine.

3. The MWRA Followed A Lawful Procedure Issuing The PAN

Chutehall contends that the MWRA failed to follow its own procedures in issuing the PAN when it neglected to follow the ERP. The ERP was adopted in conjunction with the MWRA's implementation of the regulatory framework for its Industrial Pretreatment Program under the EPA's National Pretreatment Regulations promulgated under the Federal Water Pollution Control Act (TR I: 258-268; Admin. Noticed Facts, Finding 1). The Presiding Officer found that the ERP was a set of guidelines to help determine the initial, successive, and escalating levels of enforcement actions to be taken by the MWRA when confronted by violations of 360 C.M.R. § 10.000. The Presiding Officer observed that the

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[7] "Unless otherwise provided by any law, the rules of evidence observed by courts need not be observed in these Adjudicatory Proceedings, but the rules of privilege recognized by law shall be observed." 360C.M.R. § 1.24(6)(b).

ERP document clearly states that it is "intended as guidance solely for the use of MWRA personnel," and that nothing in the guidelines is "intended to create legal rights or obligations or to limit the enforcement discretion of the [MWRA]." (AR: 625). There is no evidence in the administrative record that contravenes the Presiding Officer's finding that the ERP was merely advisory, and did not carry the force of the law. The penalties for violating § 360 C.M.R. § 10.000 are specifically authorized by §10.10 and § 10.105, and support the PAN issued against Chutehall. Consequently, the MWRA did not fail to follow its own regulations in issuing the PAN.

4. The Final Decision Is Supported By Substantial Evidence And Is Warranted by the Facts

Chutehall maintains that the MWRA failed to adduce sufficient evidence to meet its burden of proof in its case against Chutehall.

a. Identification of Pipe and Dye Test

The PAN and the affirmation of the PAN rests solely on the finding that Chutehall discharged groundwater into a pipe connected to a sewer. Chutehall contends that it discharged groundwater into a pipe connected to a recharge pit, and contests the validity of the dye test. In contrast, Barden testifies that the pipe was connected to a sewer pipe and vouches for the accuracy of the aye test that he performed. The Presiding Officer's decision to credit Barden's evidence reflects a "choice between two fairly conflicting views, ... not to be displaced" on review by this court as long as "the selection reflects

reasonable evidence." Hotchkiss, supra, 45 Mass. App. Ct. at 696. Here, the Presiding Officer accepted Barden's conclusions on the strength of the results of dye test; Chutehall's lack of immediate reaction to the dye test; and on Chutehall's failure to offer any other probative evidence or test results to contradict Barden. Moreover, the Presiding Officer reconciled the differing accounts by concluding that the two men had described two different pipes in their testimony -- which he found highly probable because of Chute's absence at the time of Barden's visit, and because of Chute's admission that there was at least one pipe connected to the sewer in the area that Barden was investigating. The court finds that the Presiding Officer supported his acceptance of Barden's account with reasonable and substantial evidence.

b. The MWRA Sewer Line

Chutehall also asserts that the MWRA never established that the sewer line which allegedly received the groundwater discharge was, in fact, an MWRA sewer. The MWRA's Enabling Act specifically authorizes regulation of those who use and discharge into "the sewer system or of any tributary system to the sewer system." St. 1984, c. 372, § 8(m). Section 8(c) of the Enabling Act lists the municipalities which the MWRA is to provide "main sewer services," a list which includes the City of Boston. MWRA witness Fiore testified about the relationship that exists between the MWRA and the BWSC. (TR II: 25-30). She described how municipality discharges impact the MWRA pipes. Id. Accordingly, the Presiding Officer's finding that a discharge into a BWSC sewer "is necessarily a discharge into the MWRA sewer system by virtue of

the connection of Boston's sewer line into MWRA's truck lines and interceptors which ultimately reach MWRA's Deer Island Treatment Plant," is supported by substantial evidence. (AR: 605-606).

c. Chutehall's Intentional Discharge of Groundwater

Chutehall asserts that the Presiding Officer's finding of intentional discharge is unsupported on the record. The Presiding Officer found that 360 C.M.R. § 2.33(2), the section of the MWRA regulations concerning intentional discharge violations, does not require proof that the Chutehall employee who caused the unpermitted discharge knew that it was prohibited, but only that he intentionally and willingly performed the acts that caused the violation. The evidence is that a Chutehall employee inserted the hose into the pipe and commenced discharge of groundwater. This finding is a reasonable interpretation of an unambiguous definition of the term "intentionally' as provided by 360 C.M.R. § 2.33(2).

6. The Final Decision Is Not Arbitrary And Capricious, An Abuse Of Discretion, Or Otherwise Not In Accordance With The Law.

The administrative record similarly fails to support Chutehall's claim that the Presiding Officer either abused his discretion in his findings and rulings, or that his findings and rulings do not comport with the law. There is no persuasive evidence in administrative record that supports Chutehall's contention that the Executive Director's Final Decision is arbitrary and capricious. In short,

Chutehall has not met its burden to demonstrate that the Final Decision is invalid. Merisme v. Board of Appeals on Motor Vehicle Liab. Policies & Bds., 27 Mass. App. Ct. 470, 474 (1989). Considered in its entirety, the administrative record demonstrates the Executive Director's Final Decision to uphold the PAN is supported by substantial evidence, and is free of legal error.

ORDER

For the foregoing reasons, the Final Decision of the Massachusetts Water Resources Authority, affirming the decision to issue a Penalty Assessment Notice against Chutehall, is hereby AFFIRMED. Accordingly, Chutehall's motion for judgment on the pleadings is DENIED.

/s/ Joseph M. Walker III
Joseph M. Walker III
Justice of the Superior Court

DATED: May 17, 2007